Supreme Court, U.S.
FILED
MAR 20 1991
OFFICE OF THE CLERK

90-1782

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ALFLEX CORPORATION

Petitioner,

v.

UNDERWRITERS LABORATORIES, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RUSSELL J. FRACKMAN
Counsel of Record
MITCHELL, SILBERBERG & KNUPP
11377 West Olympic Boulevard
Los Angeles, California 90064
Telephone: (213) 312-2000

DANIEL M. PETROCELLI
THOMAS M. HINES
MITCHELL, SILBERBERG & KNUPP

Attorneys for Petitioner
Alflex Corporation

Statement Pursuant to Rule 29.1

Petitioner Alflex Corporation has the following parent company: ADF, Inc. ADF, Inc. is owned by two entities: AEA Investors and Prudential Bache.

Petitioner Alflex Corporation has no subsidiaries.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the courts of the United States are allowed to interpret 28 U.S.C. § 1920, which authorizes only the taxation of specifically enumerated costs by the federal courts, in order to tax categories of costs not explicitly enumerated by Congress.

TABLE OF CONTENTS

Page

I. Opinion Below 1

II. Jurisdiction 1

III. Constitutional Provisions and Statutes Involved 2

IV. Statement of Case 2

V. How the Federal Questions Arose Below .. 3

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Opinion Is In Conflict With The Decision Of The U.S. Supreme Court In Crawford Fitting Co. v. J.T. Gibbons, Inc., 42 U.S. 437 (1987) 4

II. The Ninth Circuit's Opinion Is In Conflict With Crawford's Requirement Of A Single National Standard In Taxing Costs 10

III. The Ninth Circuit's Opinion Is In Conflict With Other Circuits Which Have Held That Crawford Strictly Limits Taxable Costs, And Does Not Allow Private Service of Process Fees 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

Cases

Alflex Corp. v. Underwriters Laboratories, Inc.,
914 F.2d 175 (9th Cir. 1990) 1

Alyeska Pipeline Service Co. v. Wilderness Society,
421 U.S. 240 (1975) 8

Crawford Fitting Co. v. J.T. Gibbons, Inc.,
42 U.S. 437 (1987) 3, 4, 5, 6, 7, 8, 9

Crues v. KFC Corp.,
768 F.2d 230 (8th Cir. 1985) 8, 9

Denny v. Westfield College,
880 F.2d 1465 (1st Cir. 1989) 8, 9

Independent Iron Works, Inc. v. United States Steel Corp.,
322 F.2d 656 (9th Cir.), cert. denied,
375 U.S. 922 (1963) 4, 5

Maxwell v. Hapag-Lloyd Aktiengesellschaft,
862 F.2d 767 (9th Cir. 1988) 4

SK Hand Tool Corp. v. Dresser Industries, Inc.,
852 F.2d 936 (7th Cir. 1988), cert. denied,
106 L. Ed. 2d 589 (1989) 6

Viacao Aerea Sao Paulo v. Int'l Leasing Finance Corp.,
119 F.R.D. 435 (C.D. Cal. 1988) 7

Westwind Africa Line v. Corpus Christy Marine Services Co.,
834 F.2d 1232 (5th Cir. 1988) 6

Statutes

28 U.S.C. § 1254(1) 1
28 U.S.C. § 1332 3
28 U.S.C. § 1920 ..... 1, 2, 3, 4, 5, 6, 7, 8, 9

Miscellaneous

Lanham Act (15 U.S.C. § 1121) 3

I. OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit allowing the taxation of the costs of deposition copies and private service of process fees is reported at Alflex Corp. v. Underwriters Laboratories, Inc., 914 F.2d 175 (9th Cir. 1990) (per curiam). It is reprinted at p. 1 of the Appendix ("A-1").

II. JURISDICTION

The Court of Appeals for the Ninth Circuit entered its opinion allowing deposition copies and private service of process fees to be taxed on September 13, 1990. On September 27, 1990, Alflex filed a timely "Petition for Rehearing and Suggestion for Rehearing En Banc." On December 20, 1990, the United States Court of Appeals for the Ninth Circuit

entered an order denying the "Petition for Rehearing and Suggestion for Rehearing En Banc." This order is reprinted in the Appendix at p. A-19. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The principal statute involved is 28 U.S.C. § 1920, reprinted in the Appendix at A-21.

IV. STATEMENT OF THE CASE

Alflex Corporation ("Alflex") is a manufacturer of electrical conduit. On May 26, 1987, Alflex brought suit against Underwriters Laboratories, Inc. ("UL") the Nation's largest certification company, seeking damages and injunctive relief for violation of the Lanham Act, breach of contract, negligence,

unfair competition, and other claims. The District Court entered summary judgment on April 10, 1989, dismissing Alfex's claims. On May 16, 1989, the Clerk of the Court reviewed UL's Bill of Costs and awarded less than half of the $90,349.28 requested. Alflex then served and filed a Motion to Retax Costs, which was denied in its entirety. UL also made a Motion to Retax Costs which was granted, in part, and a total of $49,090.15 was taxed against Alflex. Included in this amount were $15,655.06 for copies of deposition transcripts, and $1,324.70 for private service of process fees. Judgment was entered on August 4, 1989.

V. HOW THE FEDERAL QUESTION AROSE BELOW

The jurisdiction of the District Court was invoked under Section 43(a) of the Lanham Act (15 U.S.C. § 1121), and under 28 U.S.C. § 1332

because of diversity of citizenship, the plaintiff being a citizen of California and the defendant a citizen of Delaware.

The District Court taxed costs against petitioner pursuant to 28 U.S.C. § 1920.

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit's Opinion Is In Conflict With The Decision Of The U.S. Supreme Court In Crawford Fitting Co. v. J.T. Gibbons, Inc., 42 U.S. 437 (1987).

As the U.S. Supreme Court has made absolutely clear, "without plain evidence of Congressional intent," federal courts are not empowered "to exceed the limitations explicitly set out in [28 U.S.C. §] 1920 . . . ." Crawford Fitting Co.

v. J.T. Gibbons, Inc., 42 U.S. 437, 445 (1987). This holding was specifically recognized by the Ninth Circuit in Maxwell v. Hapag-Lloyd Aktiengesellschaft, 862 F.2d 767, 770 (9th Cir. 1988), which held that "Crawford strictly limits reimbursable costs to those enumerated in Section 1920." (emphasis added).

As Crawford made clear, the sole discretion available to the judiciary is to decline the taxpayer's costs expressly authorized by Congress. No discretion exists to permit the taxing of unenumerated costs. Crawford, supra, 482 U.S. at 441-42; see also Maxwell, supra, 682 F.2d at 770.

In its Opinion, however, the Ninth Circuit diverges from Crawford and Maxwell, and returns to a view enunciated in Independent Iron Works, Inc. v. United States Steel Corp., 322 F.2d 656 (9th Cir.), cert.

denied, 375 U.S. 922 (1963) which held that § 1920 grants "implicit" authority for the federal courts to interpret those costs which may properly be taxed – a view subsequently rejected by Crawford and Maxwell.

In its Opinion, the Ninth Circuit held that:

> "[O]ur interpretation in Independent Iron Works, that section 1920(2) encompasses the cost of a deposition copy, is still good law, because, even after Crawford, we may interpret the meaning of the items enumerated as taxable costs in Section 1920(2)."

See Oppinion at A-12.

Yet, by allowing the costs of deposition copies and private service of process fees to be taxed, the Ninth Circuit did more than simply interpret the meaning of enumerated items; instead it created two entirely new categories of costs never contemplated by Congress. This becomes abundantly clear by

examining the language of the statute, and comparing Crawford with the Opinion of the Ninth Circuit.

> As 28 U.S.C. § 1920 states, in relevant part:
>
> "A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> . . .
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case . . . ."

A comparison of the plain words of § 1920(4) and § 1920(2) makes it clear that Congress considered originals and copies to be separate and distinct items; § 1920(4) explicitly mentions copies, while § 1920(2)

mentions only the original transcript. It is also clear that when Congress intended copies to be taxed; it expressly used that very word.

In its Opinion, however, the Ninth Circuit relies on a recent decision from the Fifth Circuit which held that, although Crawford "limits judicial discretion with regard to the kind of expenses that may be recovered as costs; it does not prevent courts from interpreting the meaning of the phrases used in Section 1920." Westwind Africa Line v. Corpus Christy Marine Services Co., 834 F.2d 1232, 1238 (5th Cir. 1988). See also SK Hand Tool Corp. v. Dresser Industries, Inc., 852 F.2d 936, 944 (7th Cir. 1988), cert. denied, 106 L. Ed. 2d 589 (1989). Yet, although this Court (and many others) have interpreted the word "transcript" to include the transcript of a deposition, no interpretation of the noun can logically include both the original and a copy thereof. Likewise, to

interpret the phrase "fees . . . of the marshal" to encompass any fees, whether generated by the marshal or anyone else, is to create an entirely new category of costs never explicitly authorized by Congress.

As Crawford noted, Section 1920 "embodies Congress' considered choice as to the kinds of expenses that a federal court may tax its costs against a losing party . . . ." Crawford, supra, 482 U.S. at 440. In its Opinion, however, the Ninth Circuit ignores this considered choice and interprets "transcript" to mean "transcript plus copy" and "marshal" to mean "any authorized process server." Such an interpretation is directly at odds with Crawford's holding that the sole authority to create categories of taxable costs rests with Congress, not with the courts. See, e.g., Viacao Aerea Sao Paulo v. Int'l Leasing Finance Corp., 119 F.R.D. 435, 439 (C.D.

Cal. 1988) ("Crawford . . . precluded costs other than those expressly authorized by statute").

II.

The Ninth Circuit's Opinion Is In Conflict With Crawford's Requirement Of A Single National Standard In Taxing Costs

Absolute Congressional control over the taxation of costs insures fairness to all litigants by standardizing categories of taxable costs throughout the United States. See, e.g., Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 250-52 (1975). For this reason, Crawford held that the express, literal words of Congress are the single guideline to be followed by the federal courts in taxing costs. Because the Ninth Circuit's Opinion does not track the express, literal language of 28 U.S.C. § 1920, the single nation standard described in Alyeska and upheld by Crawford falls by the way side.

Furthermore, in applying 28 U.S.C. § 1920 as it has, and by returning a measure of interpretative leeway to the district courts, it is inevitable that national uniformity will become impossible. Indeed, this has already happened. Compare Opinion with Denny v. Westfield College, 880 F.2d 1465, 1472 (1st Cir. 1989) and Crues v. KFC Corp., 768 F.2d 230, 234 (8th Cir. 1985). If the power of tax costs is "implied" rather than "express" no single standard is possible. This is a question of exceptional importance overlooked in the Ninth Circuit's Opinion.

III.

The Ninth Circuit's Opinion Is In Conflict With Other Circuits Which Have Held That Crawford Strictly Limits Taxable Costs, And Does Not Allow Private Service Of Process Fees

Decisions in other circuits reveal a much stricter view of Crawford than that evidence by the Ninth Circuit Opinion. As the First Circuit noted in

considering expert witness fees, "Crawford warns us in unmistakable language not to try our hand at rewriting the statutory scheme according to our own notions of equity." Denny v. Westfield State College, supra, 880 F.2d at 1472. This view has also been expressed by the Eighth Circuit which has specifically held that private service of process fees do not fall under 28 U.S.C. § 1920(1) in light of Crawford. Crues v. KFC Corp., supra, 768 F.2d at 234. The Ninth Circuit's belief that "Congress exhibited an intent to make service of process a taxable item" (See Opinion at A-16), therefore, is directly at odds with the Eighth Circuit. Such a "belief" also diverges from Crawford's requirement that the courts should not interpret Congress' intentions, but instead should follow the express language of the statute.

CONCLUSION

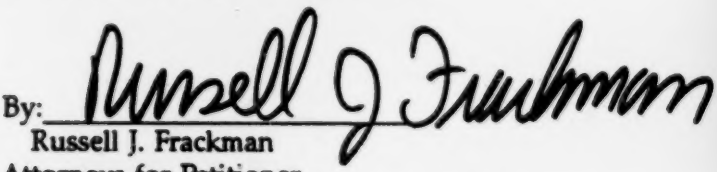
For the above-stated reasons, a Petition for Writ of Certiorari should be granted.

Dated: March 20, 1991

Respectfully submitted

RUSSELL J. FRACKMAN
Counsel of Record
MITCHELL, SILBERBERG & KNUPP
11377 West Olympic Boulevard
Los Angeles, California 90064

DANIEL J. PETROCELLI
THOMAS M. HINES
MITCHELL, SILBERBERG & KNUPP
11377 West Olympic Boulevard
Los Angeles, California 90064-1683

By: 
Russell J. Frackman
Attorneys for Petitioner
Alflex Corporation

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALFLEX CORPORATION, Plaintiff-Appellant, v. UNDERWRITERS LABORATORIES, INC., Defendant-Appellee.	)	No. 89-56008 D.C. No. CV 87-3344 JGD OPINION

Appeal from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

Argued and Submitted
June 6, 1990 – Pasadena, California

Filed September 13, 1990

Before: James R. Browning and Harry Pregerson, Circuit
Judges, and Thomas J. MacBride, District Judge[1]

Per Curiam

[1] The Honorable Thomas J. MacBride, United States District Judge for the Eastern District of California, sitting by designation.

SUMMARY

Courts and Procedure

Affirming a district court grant of summary judgment, the court of appeals held that the taxing of costs for copies of depositions and private service of process fees was proper.

The district court granted summary judgment against appellant Alflex Corporation. On appeal, that judgment was affirmed in an unpublished opinion. Alflex now challenges the district court's award of costs to Underwriters Laboratories, Inc. for the expenses it incurred in obtaining a copy of the transcript of each deposition taken by Alfex, and in

hiring private process servers to serve deposition subpoenas.

[1] Fees for deposition copies and private service of process are properly taxed against the non-prevailing party. [2] Taxing costs for copies of depositions was proper since Alflex did not challenge the district court's finding that the deposition copies were necessarily obtained. [3] Private process servers' fees are also properly taxed as costs. [4] In making Marshal's fees taxable as costs, Congress exhibited an intent to make service of process a taxable item. Now that the Marshal is no longer involved as often in the serving of summonses and subpoenas, the cost of private process serves should be taxable under the statute in question.

COUNSEL

Thomas Hines, Mitchell, Silberberg & Knupp, Los Angeles, California, for the plaintiff-appellant.

John R. Myers, Bell, Boyd and Lloyd, Chicago, Illinois, for the defendant-appellee.

OPINION

PER CURIAM:

The district court granted summary judgment in favor of respondent Underwriters Laboratories (UL) in a suit brought by appellant Alflex Corporation (Alflex). We affirmed the summary judgment in an unpublished disposition.

In this appeal, Alflex challenges the district court's award of costs to UL for the expenses UL incurred in obtaining a copy of the transcript of each deposition taken by Alflex and in hiring private process servers to serve deposition subpoenas. Alflex contends that these items are not properly taxable as costs in light of the Supreme Court's decision in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987).

We review the district judge's award of costs for abuse of discretion. *Maxwell v. Hapag-Lloyd Aktiengesellschaft*, 862 F.2d 767, 770 (9th Cir. 1988). We affirm the district court and hold that the taxing of costs for copies of depositions and private service of process fees was proper.

In *Crawford*, 482 U.S. 437 (1987), the Supreme Court held that courts do not have discretion under Fed. R. Civ. P. 54(d)[1] to tax whatever costs seem appropriate; rather, courts may tax only costs defined in 28 U.S.C. § 1920.[2] "Section 1920 enumerates

---

[1] Rule 54(d) states that "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . ."

[2] 28 U.S.C. § 1920 provides:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(continued...)

expenses that a federal court may tax as a cost under the discretionary authority found in Rule 54(d)." 482 U.S. at 441-42.

In this case, the district court taxed the cost of deposition copies and of private service of process pursuant to the Local Rules of the United States District Court for the Central District of California ("Local Rules"). Local Rule 16.4.6(a) permits taxing "[t]he cost of the original and one copy of all depositions used for any purpose in connection with the case." Local Rule 16.4.2 permits taxing as costs "[f]ees for service of process (whether served by the

---

[2](...continued)

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensations of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

United States Marshal or other persons authorized by Fed. R. Civ. P. 4).

Appellant Alflex argues that, in light of *Crawford*, these local rules should not be followed because they permit costs to be taxed that are not explicitly enumerated in section 1920.

For support, Alflex cites *Viacao Aerea Sao Paulo v. Int'l Lease Finance Corp.*, 119 F.R.D. 435 (C.D. Cal. 1988). In *Viacao*, the district court held that although deposition costs fall within the scope of § 1920(2),[3]

---

[3] Section 1920(2) allows for "Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case." *See supra* note 2.

Alflex does not argue that the cost of the *original* deposition transcript is not within the scope of this section. Indeed, there is much support for the proposition that section 1920(2) covers the costs of *deposition* transcripts, as well as trial transcripts. In

(continued...)

id. at 438, costs for *copies* of depositions do not. *Id.* at 439. The court determined that although this circuit, before *Crawford*, held that authorization to award costs of deposition copies was implied by section 1920(2), *see Independent Iron Works*, 322 F.2d at 678, such costs could no longer be taxed because "*Crawford* . . . precluded costs other than those expressly authorized by statute." *Viacao*, 119 F.R.D. at

---

[3](...continued)
Independent Iron Works, Inc. v. United States Steel Corp., 322 F.2d 656 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963), this court held that the language of that section "evidences an intent . . . to include within the items of cost the expenses of copies of transcripts of pretrial as well as trial proceedings." 322 F.2d at 677 n.26. In *Hudson v. Nabisco Brands*, 758 F.2d 1237 (7th Cir. 1985), the Fifth Circuit held that section 1920(2) provides the statutory basis for awarding costs for obtaining an original deposition transcript. The court held that a deposition transcript is included in the term "stenographic transcript," and that the term "court reporter" in section 1920(2) applies to stenographers other than and in addition to the official court reporters assigned to a particular courtroom. *Id.* at 1242. *See also United States v. Kolesar*, 313 F.2d 835, 837-38 (5th Cir. 1963).

439. The district court in *Viacao* also excluded costs attributed to "subpoena serving fee[s]" "because § 1920 does not allow such costs to be taxed." *Id.*

[1] We disagree with the analysis in *Viacao* and hold that fees for deposition copies and private service of process are properly taxed under section 1920. In *Maxwell v. Hapag-Lloyd Aktiengesellschaft*, 862 F.2d 767 (9th Cir. 1988), which was decided after *Crawford*, we allowed the costs of photographic materials used at the trial to be taxed even though, as the appellant argued in that case, such materials are not specifically or explicitly contained in section 1920. In *Maxwell*, we held that costs of photographic materials used at the trial "are encompassed by" the statute's allowance under section 1920(4) for "[f]ees for exemplification and copies of papers necessarily obtained for use in the

case." *Maxwell*, 862 F.2d at 770. We stated: "We recognize that *Crawford* strictly limits reimbursable costs to those enumerated in § 1920. We hold only that the common meaning of the phrase 'exemplification and copies of papers' may under certain circumstances encompass illustrative materials *if 'necessarily* obtained for use in the case,' as § 1920 requires." *Id.* (emphasis in original).

[2] The cost of deposition copies is "encompassed" by section 1920(2), and is therefore properly taxed under the *Crawford* and *Maxwell* holdings. In *Independent Iron Works*, 322 F.2d at 678, we held that the power to tax the expense of copies of depositions is "'implicit in 28 U.S.C.A. § 1920(2),'" (quoting *Perlman v. Feldmann*, 116 F. Supp. 102, 109 (D. Conn. 1953)), "qualified only by the requirement of that statute that the various copies by 'necessarily

obtained for use in the case.'" *Id.* We held that obtaining copies of depositions taken by the opposing party may be considered necessary in certain instances. *Id.* at 678-679. We now hold that our interpretation in *Independent Iron Works*, that section 1920(2) encompasses the cost of a deposition copy, is still good law, because, even after *Crawford*, we may interpret the meaning of the items enumerated as taxable costs in section 1920(2). Thus, here, taxing costs for copies of depositions was proper since Alflex does not challenge the district court's finding that the deposition copies were necessarily obtained.

Our holding is supported by recent decisions from the Fifth and the Seventh Circuits that have held that courts are free to interpret what constitutes taxable costs after *Crawford*. In *West Wind Africa Line*

v. Corpus Christi Marine S., 834 F.2d 1232 (5th Cir. 1988), the Fifth Circuit held that although section 1920 does not specifically mention depositions, courts have interpreted sections 1920(2) and 1920(4) to authorize taxing the costs of deposition originals *and* deposition copies if necessarily obtained for the case. *Id.* at 1237-38. The court stated that *Crawford* "limits judicial discretion with regard to the kind of expenses that may be recovered as costs; it does not, however, prevent courts from interpreting the meaning of the phrases used in § 1920." *Id.* at 1238.

In *SK Hand Tool Corp. v. Dresser Industries, Inc.*, 852 F.2d 936 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 3241 (1989), the Seventh Circuit held that the Supreme Court's decision in *Crawford* did not overrule the circuit's interpretation of section 1920(2)

as including deposition transcripts. *Id.* at 943-44. The court stated:

> Even though section 1920 does not specifically mention depositions, we do not think that *Crawford Fitting* necessarily precludes courts from finding that deposition transcripts are authorized by that statute. We agree with the Fifth Circuit that the Supreme Court did not "prevent courts from interpreting the meaning of the phrases used in § 1920."

Id. at 944 (quoting *West Wind*, 834 F.2d at 1238). Although the court did not specifically discuss whether the cost of a *copy* of a deposition transcript falls within the statute, it implicitly held that it does

when it recognized the validity of a local rule that provided:

> Except as otherwise ordered by the court, only the cost of the original of such transcript or deposition *together with the cost of one copy each* where needed by counsel . . . shall be allowed.

Id. at 944 & n.10.

[3] We also hold that private process servers' fees are properly taxed as costs. Section 1920(1) allows "[f]ees of the clerk and marshal" to be taxed as costs. Marshal's fees are governed by 28 U.S.C. § 1921 which provides, *inter alia*, for the collection of fees for serving a subpoena or summons. Local

Rule 16.4.2 permits taxing as costs fees for service of process *by any person* authorized by Fed. R. Civ. P. 4.

[4] In making Marshal's fees taxable as costs in section 1920(1), we believe Congress exhibited an intent to make service of process a taxable item. Since the enactment of section 1920(1), the method of serving civil summonses and subpoenas has changed. The U.S. Marshal no longer has that responsibility in most cases, but rather a private party must be employed as process server. *See* Fed. R. Civ. P. 4(c)[4] and 45(c).[5] Now that the Marshal is

---

[4] Rule 4(c)(2)(A) provides:

> A summons and complaint shall, except as provided in subparagraphs (B) and (C) of this paragraph, be served by any person who is not a party and is not less than 18 years of age.

Rule 4(c)(2)(B) provides:

(continued...)

---

[4](...continued)

> A summons and complaint shall, at the request of the party seeking service or such party's attorney, be served by a United States marshal or deputy United States marshal, or by a person specially appointed by the court for that purpose *only* –
>
> (i) on behalf of a party authorized to proceed in forma pauperis pursuant to Title 28, U.S.C. § 1915, or of a seaman authorized to proceed under Title 28, U.S.C. § 1916,
>
> (ii) on behalf of the United States or an officer or agency of the United States, or
>
> (iii) pursuant to an order issued by the court stating that a United States marshal of deputy United States marshal, or a person specially appointed for that purpose, is required to serve the summons and complaint in order that service be properly effected in that particular action.

Fed. R. Civ. P. 4(c)(2)(B) (emphasis added)

[5] Rule 45(c) provides in pertinent part:

(continued...)

no longer involved as often in the serving of summonses and subpoenas, the cost of private process servers should be taxable under 28 U.S.C. § 1920(1).[6]

AFFIRMED.

---

[5](...continued)

> A subpoena may be served by the marshal, by a deputy marshal, or by any other person who is not a party and is not less than 18 years of age . . .

[6] We recognize that the Eighth Circuit held differently in *Crues v. KFC Corp.*, 768 F.2d 230 (8th Cir. 1985). There, the court held that the prevailing party could not recover costs for use of a special process server because "28 U.S.C. § 1920 (1982) contains no provision for such expenses." *Id.* at 234.

However, we find the reasoning in *Roberts v. Homelite Div. of Textron, Inc.*, 117 F.R.D. 637 (N.D. Ind. 1987) more persuasive. In *Roberts* the district court held that "[d]ue to the substitution of private process servers for the U.S. Marshal Service in recent years, it is appropriate to allow private process fees as costs." *Id.* at 641.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALFLEX CORPORATION,	)	
	)	
Plaintiff-Appellant,	)	No. 89-56008
	)	
v.	)	ORDER
	)	
UNDERWRITERS LABORATORIES, INC.,	)	
	)	
Defendant-Appellee.	)	
	)	

Before: BROWNING, PREGERSON, Circuit Judges, and MACBRIDE, District Judge*

The panel as constituted above voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

---

* The Honorable Thomas J. MacBride, United States District Judge for the Eastern District of California, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

28 U.S.C. § 1920

§ 1920. Taxation of costs

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensations of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.